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# The Rule Against Perpetuities and Its Application to a Private Trust

by Reuben M. Payne\*

TESTATOR DEVISED certain real property to his daughter in fee. Thereafter he executed a codicil whereby said devise was revoked and the same property was devised to his son-in-law, in trust. Trustee was to hold it in trust for testator's daughter during the term of her life and in the event of death of daughter, son-in-law was to take possession of property, lease it, and use rents for support, education and benefits of the children of daughter. Daughter survived testator and gave birth to two additional children after testator's death. *Held*: the trust the testator attempted to create in his codicil was void as in violation of the Rule Against Perpetuities, where daughter survived testator and gave birth to two additional children after testator's death.<sup>1</sup>

The court's decision is that a trust for private purpose must terminate within the period of the Rule Against Perpetuities. The court would apply the rule so as to restrict the *duration* of an ordinary private trust even where all interests are vested or must vest within lives in being plus twenty-one years. It is not surprising that in so applying the rule, the court quotes from and cites cases and text books which, unfortunately, are not authority for the court's holding.<sup>2</sup>

The fallacy of the conclusion is one of the many instances of misapplication of the Rule Against Perpetuities. The only logical conclusion that can be drawn is that while the trust may have lasted longer than twenty-one years plus a life in being, each of the daughter's children took a vested interest at birth, which would, of course, occur during the life of the daughter. Therefore

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<sup>1</sup> *Mercer v. Mercer*, 230 N. C. 101, 52 S. E. 2d 229 (1949).

<sup>2</sup> The court cites 1 BOGERT, TRUSTS AND TRUSTEES, Sec. 218 (1935); *Billingsley v. Bradley*, 166 Md. 412, 171 Atl. 351 (1934); *American Trust Company v. Williamson*, 288 N. C. 458, 46 S. E. 2d 104 (1948); *Spring v. Hopkins*, 171 N. C. 486, 88 S. E. 744 (1916). All of this authority holds contra and/or involves indestructible trusts.

in strict legal principle the Rule Against Perpetuities is satisfied, since the interests have vested within the time stipulated.<sup>3</sup>

The court in the present case was confronted with two very interesting and important questions of law.

*First:* Assuming that there were no violation of any rule against remoteness of vesting and no unlawful restraint on the alienation of the trust property, must an indestructible private trust or a private trust be limited in duration? For example, if the absolute owner of realty vests it in a trustee for the benefit of his wife and children living when the trust instrument becomes effective, and these instruments of the cestuis are vested and indefeasible, may the settlor provide that the trust shall endure for a period of twenty-five years, or for a period measured by lives not in being at the start of the trust, or for an indefinite period into the future, or forever?

*Second:* As commented on briefly by the court, it is argued that the provisions of this trust are invalid because there is no limitation over after the death of daughter's issue, and that there is no provision for the final termination of the trust. Must the settlor stipulate for the discontinuance of the trust at the end of a certain limited time? Further, if he makes no provision for the final termination of the trust what are the consequences?

### The Rule Against Perpetuities.

The Rule Against Perpetuities was first promulgated in the *Duke of Norfolk's*<sup>4</sup> case, 1682, and fixed the character of the rule as we now know it. It concludes that a devise over is not objectionable because of the nature of the contingent right that is being devised, but because of the time within which the future right is to vest. The rule stated simply says, "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."<sup>5</sup> The rule governs both legal and equitable interests in both realty<sup>6</sup> and personalty.<sup>7</sup>

<sup>3</sup> *Shoemaker v. Newman*, 65 F. 2d 208, 89 A. L. R. 1034 (1933), *Cert. den.*, 290 U. S. 656, 78 L. Ed. 568, 54 S. Ct. 72; *Wilbur v. Portland Trust Company*, 121 Conn. 535, 186 Atl. 499 (1936); *Allen v. Almy*, 87 Conn. 517, 89 Atl. 205; *Curtis v. Maryland Baptist Union Assoc.*, 176 Md. 430, 5 A. 2d 836, 121 A. L. R. 1516 (1939); *Joseph Schonthal Company v. Sylvania*, 60 Ohio App. 407, 21 N. E. 2d 1008 (1938); *Friday's Estate*, 272 Pa. 143, 116 Atl. 392, 28 A. L. R. 366 (1922).

<sup>4</sup> 3 Ch. Cas. 1 (1682).

<sup>5</sup> GRAY, *RULE AGAINST PERPETUITIES*, Sec. 201 (4th ed. 1942).

<sup>6</sup> GRAY, *op. cit.*, Chap. VIII, p. 309.

<sup>7</sup> *Id.*, p. 351.

Gray, in speaking of the Rule Against Perpetuities states<sup>8</sup> that the rule is concerned only with the beginning of interests, it settles the time within which future interests must vest; but, when once vested, they are all, present and future alike, subject to the same restraint against alienation and the rule has nothing to do with restraint against alienation. Although the rule was framed by the courts to prevent undue suspension of the power of alienation,<sup>9</sup> it was not worded in terms of alienation.<sup>10</sup> It sought to accomplish its purpose indirectly by procuring the vesting of all property interests within one generation and a short time thereafter, on the theory that a vested interest would surely be alienable, whereas contingent interests would often or generally be legally or practically inalienable. The Rule Against Perpetuities applies only to future contingent estates and is inapplicable to estates already vested.<sup>11</sup> Hence the rule does not affect vested remainders<sup>12</sup> or reversions.<sup>13</sup> The fact that a gift, although vested, is subject to a condition subsequent, does not bring it within the rule.<sup>14</sup> A present interest is not affected by the rule whether alienable or not, and if inalienable is still valid if vested, although it may be otherwise prohibited by the rule against restraints on alienation.<sup>15</sup> Thus the inescapable conclusion is that the Rule Against Perpetuities applies only to the time when the legal interest will vest in the trustee, as well as to time when the equitable or beneficial interest will vest in the beneficiaries. The question is not the length of the trust but whether title vested within the required time; and if a vested estate is defined as one

<sup>8</sup> Id., Sec. 121.5, p. 121.

<sup>9</sup> This rule was developed by the English courts in the seventeenth, eighteenth and nineteenth centuries in order to prevent undue clogging of the alienation of property through the use of the new interests made possible by the Statute of Uses and the Statute of Wills, namely executory interests and shifting and springing uses, as well as future interests in personal property. These interests were indestructible by the forfeiture method which applied to contingent remainders, and hence property could not be freed from them; they hindered the alienation of a fee or other complete interest.

<sup>10</sup> That the contingent remote interest is alienable is not material. *In re Hargraves* 43 Ch. Dec. 401.

<sup>11</sup> Cases cited note 3 *supra*.

<sup>12</sup> *Melvin v. Hoffman*, 290 Mo. 464, 235 S. W. 107 (1921); *Gates v. Seibert*, 157 Mo. 254, 57 S. W. 1065 (1900). In this connection, see Am. Law Inst. RESTATEMENT, PROPERTY, Sec. 157 (1936).

<sup>13</sup> *Gates v. Seibert*, *supra* note 12.

<sup>14</sup> *In re Stickney* (Congregational Church Bldg. Soc. v. Everitt) 85 Md. 79, 36 Atl. 654, 35 L. R. A. 693 (1897).

<sup>15</sup> *Barton v. Thaw*, 246 Pa. 248, 92 Atl. 312 (1914).

where there is either an immediate right of present enjoyment or a present fixed right of future enjoyment,<sup>16</sup> it is difficult to understand how the North Carolina court reached the conclusion that the provisions of the settlor's codicil were in violation of the Rule Against Perpetuities when all rights were vested.

### Application of the Rule to Trusts in General.

The rule may not be evaded by the creation of a private trust.<sup>17</sup> Trusts, like all property interests, are subject in their creation to two restrictive rules, namely, the rule against remoteness<sup>18</sup> or perpetuities, and the rule against suspension of the power of alienation.<sup>19</sup> Unfortunately, the terms remoteness or perpetuity and suspension of the power of alienation mean very different things;<sup>20</sup> and worse still the terms are frequently so used and grouped under the heading of "Rule Against Perpetuities" that the Rule Against Perpetuities is construed to include both<sup>21</sup> a prohibition of undue remoteness of vesting, and a prohibition of the undue suspension of the power of alienation. Thus it is exceedingly difficult in many cases to tell which rule or which perpetuity (remoteness of vesting or suspension of the power of alienation) the courts have had in mind. For the purpose of clarity these two entirely distinct<sup>22</sup> rules should be treated separately as the rule against Remoteness of Vesting (as suggested by the leading American authority)<sup>23</sup> and the Rule against the Suspension of the Power of Alienation.

<sup>16</sup> *Patrick v. Beatty*, 202 N. C. 454, 163 S. E. 572 (1932); *Curtis v. Maryland Baptist Union Assn.*, 176 Md. 430, 5 A. (2d) 836, 121 A. L. R. 1516 (1939).

<sup>17</sup> *O'Hare v. Johnston*, 273 Ill. 458, 113 N. E. 127 (1916); *Sears v. Putnan*, 102 Mass. 5 (1869); *Lovering v. Worthington*, 106 Mass. 86 (1870); *Rudolph v. Schmalstig*, 4 Ohio Supp. 58, 9 Ohio Op. 452, 25 Ohio L. Abs. 249 (1933); *Hoopert v. Gugel*, 25 Ohio N. P. N. S. 516 (1924).

<sup>18</sup> Remoteness contemplates the postponing to a remote period the arising of future interests. The law provides against this by the doctrine that all interests must arise within certain limits, that is, by the rule against perpetuities. GRAY, *THE RULE AGAINST PERPETUITIES*, Sec. 119 (4th ed. 1942).

<sup>19</sup> The tying up of property, the taking of it out of commerce is accomplished by restraining the alienation of interests in it. The law provides against this by the doctrine that all interests should be alienable. GRAY, *op. cit.*, Sec. 719 (4th ed. 1942).

<sup>20</sup> The distinction between the rules governing restraints on alienation and the Rule Against Perpetuities is stated in *Becker v. Chester*, 115 Wis. 90, 91 N. W. 87 (1902).

<sup>21</sup> GRAY, *op. cit.*, Sec. 437.1 (1942). SIMES, *LAW OF FUTURE INTERESTS*, Sec. 490 (1936).

<sup>22</sup> *Colonial Trust Company v. Brown*, 105 Conn. 261 (1926).

<sup>23</sup> GRAY, *op. cit.*, Sec. 2 (1942).

Since being concerned only with the Rule of Remoteness the question then arises, how does the Rule Against Remoteness restrict the purpose for which trusts may be created? As has been illustrated, the rule has to do only with the date at which property interests vest in interest.<sup>24</sup> They must not remain contingent for too long a period,—lives in being plus twenty-one years from the date the instrument takes effect. That being true, it follows that the Rule of Remoteness of vesting may touch a trust in one of three ways, at its origin,<sup>25</sup> during its continuance,<sup>26</sup> or at its termination.<sup>27</sup>

### **The Effect of the Rule Against Perpetuities at the Origin of a Trust.**

It is fundamental in the law of trusts that if a trust is created and the legal interest of the trustee is to vest at a future date, it must not be for more than twenty-one years after the expiration of the named lives in being at the creation of the interest.<sup>28</sup> Thus a trust to begin if and when a gravel pit is worked out<sup>29</sup> is void, because the origin or vesting is contingent; it may or may not vest within the limits of the prescribed rule. The Rule of Remoteness is a positive rule of law or mandate;<sup>30</sup> it must vest and cannot depend on the contingency of whether it may or may not vest.<sup>31</sup>

<sup>24</sup> *Supra* note No. 8 and cases cited note No. 3, *supra*.

<sup>25</sup> *In re Dyer*, 1935, Vict. L. R. 273; (A trust to begin if and when an orchestra is established in a certain city).

<sup>26</sup> *Anderson v. Williams*, 262 Ill. 308, 104 N. E. 659 (1914); *Ann. Cas.* 1915 B 720; *Ortman v. Dugan*, 130 Md. 121, 100 Atl. 82 (1917); *Clark v. Union County Trust Company*, 127 N. J. Eq. 221, 12 A. 2d 365 (1940).

<sup>27</sup> *In re Johnston's Estate*, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621 (1898).

<sup>28</sup> *Supra* note 5.

<sup>29</sup> *In re Wood* (1894), 3 Ch. 381. *See also* *Taylor v. Crosson*, 98 Atl. (Del. Ch.) 375 (1916); *Overley v. Scarborough*, 145 Ga. 875, 90 S. E. 67 (1916); *Ortman v. Dugan*, 130 Md. 121, 100 Atl. 82 (1917); *Ewalt v. Davenport*, 257 Pa. 385, 101 Atl. 756 (1917); *Rhode Island Hospital Trust Company v. Peck* 40 R. I. 519, 101 Atl. 430 (1917) (A provision for the payments of one half the income of the trust fund to the settlor or his eldest male heir on demand at any time is void, as creating an interest too remote); *Amory v. Trustees of Amherst College*, 229 Mass. 374, 118 N. E. 933 (1918). *But see* *Strout v. Strout*, 117 Me. 357, 104 Atl. 577 (1918) (discretionary power in the trustee as to the time of payment of the cestui que trust's interest does not cause a violation).

<sup>30</sup> 21 R. C. L. 294 (1918); *Bender v. Bender*, 225 Pa. 434, 74 Atl. 246 (1909); *Gerber's Estate*, 196 Pa. 366, 46 Atl. 497 (1900); *In re Lockhart's Estate*, 306 Pa. 394, 159 Atl. 876 (1932); *In re Friday's Estate*, 313 Pa. 328, 170 Atl. 123 (1933).

<sup>31</sup> *Millikin National Bank v. Wilson*, 343 Ill. 55, 174 N. E. 857, 75 A. L. R. 117 (1931); *In re Roe*, 281 N. Y. 541, 24 N. E. 2d 322, 131 A. L. R. 707 (1939).

### **The Effect of the Rule Against Perpetuities During the Continuance of the Trust.**

Suppose there are provisions for a present trust by deed or will, with vested legal and equitable interests at the start of the trust, but the trust also creates a future contingent interest to vest at a later date during the administration of the trust. Such future contingent secondary interest under the trust must vest, it at all, during or at the end of the period of the rule. Thus if S gave all his property to T to pay the net income over to S's widow and, at the death of the survivor of widow and children, to pay the income to his grandchildren share and share alike, it is evident that S is providing for contingent estates in the grandchildren. Since these ultimate equitable interests in the grandchildren of S are contingent, it becomes important to ascertain whether they are sure to vest within, or at the end of, lives in being at the death of S, plus a period of twenty-one years thereafter. Thus if the grandchildren's equitable interests are to be regarded as vested from the date of the death of the last surviving child of S, that date will not be too remote since all the children of S must have been in being at the death of S. If the trust is construed as providing for gifts over from one grandchild to another, as the grandchildren severally die off, such gift over will be void, because they may vest at the end of lives in being, followed by lives not in being. The grandchildren are not persons sure to be in being at the death of S. The equitable interests of the grandchildren may shift from one grandchild to another at a date measured by lives in being (those of the widow and children of S) plus lives not necessarily in being at the death of S (those of the grandchildren of S).<sup>32</sup>

The rule does not consider the person in whom the interests shall vest, so long as vesting is within the period prescribed by law; the identity of the person who takes is immaterial. He may

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<sup>32</sup> Instances of violation of the rule against remoteness in the creation of trusts, through provisions for remote contingent secondary or tertiary interests in cestuis are quite common. See: *In re Harrison's Estate*, 22 Cal. App. 2d 28, 70 P. 2d 522 (1937); *Corvin v. Rheims*, 390 Ill. 205, 61 N. E. 2d 40 (1945); *McEwen v. Enoch*, 167 Kan. 119, 204 P. 2d 736 (1949); *Betchard v. Iverson*, 212 P. 2d 783 (1950); *McGaughey v. Spincer County Board of Education*, 285 Ky. 769, 149 S. W. 2d 519, 133 A. L. R. 1447 (1945); *Smith v. Fowler*, 301 Ky. 96, 190 S. W. 2d 1015 (1945); *Vickery v. Maryland Trust Company*, 188 Md. 178, 52 A. 2d 100 (1947); *Clark v. Union County Trust Co.*, 127 N. J. Eq. 221, 12 A. 2d 365 (1940); *In re Yeager's Estate*, 345 Pa. 463, 47 A. 2d 813 (1946).

be unborn when the trust is created. These persons are determined at the time of distribution; they must *then* be living.<sup>33</sup>

### **The Effect of the Rule Against Perpetuities at the Termination of a Trust.**

The rule is frequently violated by a contingent interest following the trust estate. It should be noted that all contingent interests following after a trust estate are subject to the Rule Against Remoteness, and may drag the trust down with them if they violate the rule. Thus, if a trust is created for a term of fifty years and contingent legal remainders are provided to follow the trust term, it is obvious that these contingent interests violate the Rule Against Remoteness. It may well be, as contended by some courts and many students of the law, that the incident of a subsequent illegal remainder to a valid preceding interest will so destroy the scheme of the testator that it will be necessary, in order to prevent an unjust disposition of the property, to declare the trust void.<sup>34</sup> Conceded that the proposition has a good deal of

<sup>33</sup> *Hastings v. Tate*, 25 Pa. 249 (1855); *In re Friday's Estate*, 91 A. L. R. 766, 313 Pa. 328, 170 Atl. 123 (1933).

<sup>34</sup> *Bowerman v. Taylor*, 126 Md. 203, 94 Atl. 652 (1915); *Springfield Safe Deposit and Trust Co. v. Ireland*, 268 Mass. 62, 167 N. E. 261, 64 A. L. R. 1071 (1933); *Melvin v. Hoffman*, 290 Mo. 464, 235 S. W. 107 (1922); *Camden Safe Deposit and Trust Co. v. Guerin*, 87 N. J. Eq. 72, 99 Atl. 105 (1916); *Closset v. Buttchaell*, 112 Or. 585, 230 P. 554 (1924), (Where trust was to last for lives of grandchildren, and the will did not state whether those born after the death of testator were included, and to include them would make the gift over after the trust too remote, will is construed to include only those born during the life of testator. This seems contrary to usual rules regarding perpetuities. See *Bridgeport City Trust Co. v. Alling*, 125 Conn. 599, 7 A. 2d 833 (1939); *Accord*, *Thames Bank and Trust Co. v. Adams*, 125 Conn. 656, 7 A. 2d 836 (1939).)

Where a remainder is limited to the heirs of A if he leaves any, and if he leaves none then to the heirs of the body of B, and the trust preceding the remainder is sure to last for lives in being and may last for lives not in being, the remainder is void under the rule and drags the trust down with it, since to give effect to the trust without the remainder would frustrate the testator's fundamental purpose. *Johnston v. Crosby*, 374 Ill. 407, 29 N. E. 2d 608 (1940).

Where a trust was to last for lives in being and possibly for lives not in being, a gift of a remainder interest to vest at the end of the trust was invalid as vesting too remotely, but the trust for the preceding life tenants were separable and valid. *Bankers Trust Co. v. Garver*, 222 Iowa 196, 268 N. W. 568 (1936).

Where a trust was created to last possibly for 40 years, with a gift to grandchildren of the testator at that date, the gift to the grandchildren was remote and void, although a grandchild was born at the time the will took effect. The class gift is not regarded as vested for the purpose of the rule until the class is closed. *Beverlin v. First Natl. Bank in Wichita*, 155 A. L. R. 688, 151 Kan. 307, 98 P. 2d 200 (1940).

(Continued on following page)



merit, it should also be pointed out that although there is a trust followed by a remainder which is too remote and therefore void, yet the trust may be separable and may stand alone.<sup>35</sup> In many cases the only effect of the violation of the Rule Against Remote-ness by a contingent remainder is that the remainder is void.<sup>36</sup> The trust preceding the remainder is enforced.<sup>37</sup> The accepted rule of law is that a valid limitation which is associated with, but practically possible of separation from, one that transgresses the Rule Against Perpetuities, will not be struck down unless not only the will as a whole shows the void limitation, but also that the general scheme and the dominant purpose of the whole disposition is to tie up testator's estate beyond the time allowed by law.

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Footnote 34 (continued):

A gift of a legal estate, with remainder to great nephews and great nieces of the testator in being at the time of death of life tenant is valid as to the children of nephews and nieces of testator which nephews and nieces were in being when the will took effect. *Tuttle v. Steel*, 281 Ky. 281, 135 S. W. 2d 436 (1939). This would seem incorrect, since all ultimate legatees would be ascertained and take their interests at the end of one life, namely of the legal life tenant.

Gift of remainder after trust which was not to vest until a period had ended, possibly including the lives of persons not in being, was too remote and made whole trust void. *Blackhurst v. Johnson*, 72 F. 2d 644 (8th Cir. 1934).

Where remainders after a trust are contingent and are not to vest until the trustee exercises discretion to terminate the trust, the remainders are too remote as to vesting, void, and drag down the trust with them as inseparably connected. *In re Morrison's Estate*, 173 Misc. 503, 18 N. Y. S. 2d 235 (1939).

Where remainders following a trust were to vest at the end of lives in being there is no violation of the Rule Against Perpetuities, *Wurst v. Savings Deposit and Trust Co.*, 37 Ohio L. Abs. 393, 47 N. E. 2d 676 (1940).

<sup>35</sup> GRAY, *THE RULE AGAINST PERPETUITIES*, Sec. 247 (4th ed. 1942); *Wilmington Trust Co. v. Wilmington Trust Co.*, 25 Del. Ch. 121, 15 A. 2d 153 (1940), *affirmed*, 24 A. 2d 309, 139 A. L. R. 1117 (1942) (Where valid life interests are given, remote remainder interests which are void under the rule do not drag down with them the preceding life interests).

Where the donor has not expressly separated out two contingencies on which a gift is to take effect, one of which would be valid under the rule and the other bad, the court will not make the separation even though the valid contingency has happened. *Throne v. Continental National Bank and Trust Company of Chicago*, 305 Ill. App. 222, 27 N. E. 2d 302 (1940).

Where life interests are provided with remote executory limitations following, the former will be permitted to take effect. *Beverlin v. First Natl. Bank in Wichita*, 151 Kan. 307, 98 P. 2d 200, 155 A. L. R. 688 (1940).

<sup>36</sup> *Beverlin v. First Natl. Bank in Wichita*, *supra* note 35.

<sup>37</sup> *Beers v. Marramore*, 61 Conn. 13, 22 Atl. 1061 (1891); *Loomer v. Loomer*, 76 Conn. 522, 57 Atl. 167 (1904); *Wolf v. Hatheway*, 81 Conn. 181, 70 Atl. 645; *Dime Savings and Trust Co. v. Watson*, 254 Ill. 419, 98 N. E. 777 (1912); *Camden Safe and Deposit Co. v. Guerin*, 87 N. J. Eq. 72, 99 Atl. 105 (1916).

When such is the case the trust falls in its entirety.<sup>38</sup> The latter of the two criteria has received a great deal of criticism from many text-writers.

**The Effect of the Rule Against Perpetuities as Applied to the Failure to Provide For a Limitation Over or the Failure to Provide for Termination of the Trust.**

It was contended by the court in *Mercer v. Mercer*,<sup>39</sup> that the failure of the testator to provide for a limitation over after the death of the daughter's issue, and the lack of provisions for the final termination of the trust, resulted in a violation of the Rule Against Perpetuities. With all respect to the court the authorities do not bear this out. In *Scott v. Powell*,<sup>40</sup> where a will creates a trust with remainder interests and makes no provision for the disposition of the remainder upon a contingency which happens, there is a resulting trust as to the remainder for the successors of the settlors. Likewise in *Union National Bank of Pasadena v. Hunter*,<sup>41</sup> the court said that where the settlor of a trust makes no provision, express or implied, for the disposition of a trust income in a certain situation, it goes by resulting trust to the successors of the settlors. Again, in *Tapley v. Dill*,<sup>42</sup> where the settlor leaves property by will to trustees, but fails to dispose of all the equitable interests under the trust, there is a resulting trust as to undisposed part for the heirs of the testator; and *In re Jackson's Trust*,<sup>43</sup> where a trust instrument disposes of an interest for the life of the beneficiary, but not of the remainder interests, there is a resulting trust of the remainder for the settlor. These and many other decisions can be found to support the proposition that there is no basis in law for declaring a trust void merely because the testator neglected to provide for a remainder interests or to specify a date of termination for the trust. It is humbly submitted that the North Carolina Court was mistaken as to this question of law.

<sup>38</sup> GRAY, THE RULE AGAINST PERPETUITIES, Sec. 249 (4th ed. 1942); *In re Whitman's Estate*, 248 Pa. 285, 93 Atl. 1062 (1915); *In re Lockart's Estate*, 267 Pa. 390, 111 Atl. 254 (1920), 306 Pa. 394, 159 Atl. 874 (1932).

<sup>39</sup> 230 N. C. 101, 52 S. E. 2d 229 (1949).

<sup>40</sup> 182 F. 2d 75 (1950).

<sup>41</sup> 93 Cal. App. 2d 669, 209 P. 2d 621 (1949).

<sup>42</sup> 58 Mo. 824, 217 S. W. 2d 369 (1949).

<sup>43</sup> 351 Pa. 89, 40 A. 2d 393 (1945).

### The Rule of Perpetuities as it Affects the Duration of a Trust.

One would think that the courts of America would have long since ceased to be puzzled by the question of the duration of a trust. At one time there were a few scattered decisions throughout the country which did not adhere<sup>44</sup> to the present day weight of authority<sup>45</sup> to the effect that there is no limit of time which a vested interests under a trust may last. Those contrary decisions have long since been overruled.<sup>46</sup> Bogert,<sup>47</sup> in speaking on the subject states, "Courts and writers have sometimes stated in an erroneous fashion that every express private trust must be limited in duration to a period not longer than lives in being when the trust starts and twenty-one years thereafter. This would make it appear that there is some common law or generally adopted statutory rule directly and in so many words limiting the possible life of a trust. This is incorrect<sup>48</sup> except in those states where trusts in general,<sup>49</sup> or certain trusts<sup>50</sup> have been limited in their duration by statute." Insofar as the duration involves the creation of contingent interests, it is true there must be a limit of time; but to say that there must be a limit where all interests under the trust have vested, as was the case in *Mercer v. Mercer*,<sup>51</sup> is one which cannot be sustained by the weight of authority.<sup>52</sup>

Any answer to the question of the duration of a trust must take recognition of the law as it was promulgated in *Clafin v.*

<sup>44</sup> *Thomas v. Gregg*, 76 Md. 169, 24 Atl. 418 (1892); *Slade v. Patten*, 68 Me. 380 (1878).

<sup>45</sup> GRAY, *op. cit.*, Sec. 232 (1942); 1 PERRY, *TRUST AND TRUSTEE*, 7th ed., Sec. 383 (1929); *RESTATEMENT, TRUSTS*, Sec. 62-K (1935); 1 SCOTT, *TRUSTS*, Sec. 62.10 (1939); 2 TIFFANY, *REAL PROPERTY*, 3rd ed., Sec. 408 (1939); 2 SIMES, *FUTURE INTERESTS*, Sec. 500, 501, 557 (1936); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938); Clearly, *Indestructible Testamentary Trusts*, 43 YALE L. J. 393, 398 (1934); *Chicago Title and Trust Co. v. Shellabeger*, 399 Ill. 320, 77 N. E. 2d 675 (1948).

<sup>46</sup> *Pulitzer v. Livingston*, 89 Me. 359 (1896) overrules *Slade v. Patten*, 68 Me. 380 (1878); *Gambrill v. Gambrill*, 122 Md. 563, 89 Atl. 1094 (1914) disapproves *Thomas v. Gregg*, 76 Md. 169, 24 Atl. 418 (1892); See Simes, *Fifty Years of Future Interests*, 50 HARV. L. REV. 749 (1937).

<sup>47</sup> BOGERT, *TRUSTS AND TRUSTEES*, Sec. 218, p. 405 (1951).

<sup>48</sup> "The common law has no rule restricting the actual duration for a trust." 9 U. MINN. L. REV. 314, 327; *The Rule Against Indestructibility of Trusts in Pennsylvania*, 47 DICK. L. REV. 177; *The Supposed Rule Limiting the Duration of Indestructible Trust*, 28 CHICAGO BAR RECORD 369 (1947); See 43 YALE LAW J. 393.

<sup>49</sup> See note 39, BOGERT, *TRUSTS AND TRUSTEES*, Sec. 218, p. 405 (1951).

<sup>50</sup> See note 40, *op. cit.*, Sec. 218 p. 406 (1951).

<sup>51</sup> *Supra* note 1.

<sup>52</sup> Cases cited, note 3 *supra*.

*Claflin*,<sup>53</sup> and its so-called indestructible trust.<sup>54</sup> There the court was confronted with a clause in a will directing the accumulation of a fund for the benefit of testator's son, then in being, to be paid in installments as the legatee shall reach the ages of twenty-one, twenty-five and thirty years, respectively. The legatee had not reached the age of twenty-five when he brought an action calling for the remainder of the trust to be conveyed to him. The court in denying the action held that a settlor is allowed to compel the cestui to take limited enjoyment for a time and that there was nothing inimical to the public interest in such a clause.

In looking at the authorities on the subject (aside from those dealing with charities or alleged charities), there is dicta and decision to affirm the proposition as set forth. Trusts for a period of years more than twenty-one years have been sustained either without discussion or even after argument on the question of their duration.<sup>55</sup> Private trusts to last for thirty years, which period might possibly be measured in duration by lives not in being at the commencement of the trust, have been upheld either without objection or after a consideration of the problems of duration.<sup>56</sup>

<sup>53</sup> 149 Mass. 19, 20 N. E. 454 (1889).

<sup>54</sup> A trust is considered to be indestructible when the courts will not terminate it or when the settlor has expressly prohibited termination even though the cestui is of sound mind and age and can call for a conveyance of the legal estate, possession of the res, and a termination of the trust.

<sup>55</sup> *O'Hare v. Johnston*, 293 Ill. 458, 113 N. E. 127 (1916); *Nicol v. Morton*, 332 Ill. 533, 164 N. E. 5 (1929); *Deacon v. St. Louis Union Trust Co.*, 271 Mo. 669, 197 S. W. 261 (1917); *Lembeck v. Lembeck*, 73 N. J. Eq. 427, 68 Atl. 377 (1908); *In re Johnston's Estate*, 185 Pa. 179, 39 Atl. 870 (1898); *Tramell v. Tramell*, 162 Tenn. 1, 32 S. W. 2d 1025, 35 S. W. 2d 574 (1931); *Cowherd v. Fleming*, 84 W. Va. 227, 100 S. E. 84 (1919).

<sup>56</sup> *Wolfe v. Hatheway*, 81 Conn. 181, 70 Atl. 645 (1908); *Greenwich Trust Co. v. Shively*, 110 Conn. 117, 147 Atl. 367 (1929); *Gambrill v. Gambrill*, 122 Md. 563, 89 Atl. 1094 (1914), *repudiating* *Thomas v. Gregg*, 76 Md. 169, 24 Atl. 418 (1892) and *Reed v. McIlvain*, 113 Md. 140, 77 Atl. 329; *Seaver v. Fitzgerald*, 141 Mass. 401, 6 N. E. 73 (1887); *Gray v. Whittemore*, 192 Mass. 367, 78 N. E. 422 (1906); *McAllister v. Elliott*, 83 N. H. 225, 140 Atl. 708 (1928).

In *Story v. First National Bank and Trust Co.*, 115 Fla. 436, 156 So. 101 (1934), the court stated that a trust which might last for lives of persons to be born after it went into effect would be held valid, at least as to lives of persons in being at death of settlor testator. (It is uncertain whether in this case the court concluded that there is no common law rule as to length of duration of private indestructible trust, or that one to last too long will be shortened to the permitted period). See also *Guarantee Trust Co. v. Latz*, 119 N. J. Eq. 194, 181 Atl. 645 (1935). (Trust to last for lives in being and part of lives not in being, *Held* valid, since interest of all cestuis would vest not later than the end of lives in being). Likewise in *Pennsylvania Co. v. Robb*, 118 N. J. Eq. 529, 180 Atl. 410 (1935), *affirmed*, 123 N. J. Eq. 232, 191 Atl. 741 (1941) the court held that a trust to last for lives of children and grandchildren of testator, which might last for lives not in being, was valid. There was no criticism of duration, the sole questions discussed being those of vesting.

Authority can also be found validating trusts of indefinite or perpetual duration.<sup>57</sup> In *Pulitzer v. Livingston*<sup>58</sup> the court, in referring to the decision of *Slade v. Patten*,<sup>59</sup> stated, "It cannot be sustained either upon principle or authority. A future limitation that may not vest within that period creates a perpetuity, and is therefore void. But a limitation that must vest, if at all, within the period does not create a perpetuity, and it makes no difference when the trust or interest limited terminates, if it has vested within the period. . . . The right of possession or enjoyment may be postponed longer." Again, in *Howe v. Morse*<sup>60</sup> the court declared "If the trust is destructible, there is no objection to its indefinite duration." In *Baker v. Stern*<sup>61</sup> the Supreme Court of Wisconsin held that a business trust to last for an indefinite period was unobjectionable where the interests of cestuis and trustee were alienable. Added to this are the many existing dicta which support the proposition that the trust may last for longer than lives in being and twenty-one years.<sup>62</sup> In *Loomer v. Loomer*<sup>63</sup> the court uses the following strong language: "There is no rule which limits the continuance of a trust to any period of time. A trust is no more invalid for the reason that it may continue thirty years than is a life estate or estate in fee simple. The essential thing is that the beneficial interest under the trust vest in the cestui que trust within the time limited by law for the vesting of legal estates."

Trusts limited as to duration to one or more lives in being are clearly valid.<sup>64</sup> In view of this, the so-called rule of too great a

<sup>57</sup> *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246 (1893); *Pulitzer v. Livingston*, 89 Me. 359, 36 Atl. 635 (1897), *overruling* *Slade v. Patten*, 68 Me. 380 (1878); *O'Rourke v. Beard*, 151 Mass. 9, 23 N. E. 576 (1890); *Talbot v. Riggs*, 287 Mass. 144, 191 N. E. 360, 93 A. L. R. 964 (1934); *Cooper's Estate*, 150 Pa. 576, 24 Atl. 1057 (1892).

<sup>58</sup> 89 Me. 359, 36 Atl. 635 (1897).

<sup>59</sup> 68 Me. 380 (1878).

<sup>60</sup> 174 Mass. 491, 55 N. E. 213 (1899). *And see* the comment of Holmes, J. in *O'Rourke v. Beard*, 151 Mass. 9, 23 N. E. 756 ( ).

<sup>61</sup> 194 Wisc. 233, 216 N. W. 147, 58 A. L. R. 462 (1927).

<sup>62</sup> *Loomer v. Loomer*, 76 Conn. 522, 57 Atl. 167 (1904); *DeLadson v. Crawford*, 93 Conn. 403, 106 Atl. 326 (1919); *Colonial Trust Co. v. Waldon*, 112 Conn. 216, 152 Atl. 69 (1930); *Johnson v. Preston*, 226 Ill. 447, 80 N. E. 1001 (1907); *Armstrong v. Barber*, 239 Ill. 389, 88 N. E. 246 (1909) (limits not defined); *Metter v. Warner*, 243 Ill. 600, 90 N. E. 1099 (1910) (fifteen year trust, no discussion of duration); *Guerin v. Guerin*, 270 Ill. 239, 245, 110 N. E. 402 (1915); *Otterback v. Bohrer*, 87 Va. 548, 12 S. E. 1013 (1891).

<sup>63</sup> 76 Conn. 522, 57 Atl. 167 (1904).

<sup>64</sup> A trust to sell and distribute "as soon as possible" must end within the life time of the trustee and is therefore not subject to attack under any

duration as announced by the court in *Mercer v. Mercer*,<sup>65</sup> can hardly be sustained.

The rule of *Clafin v. Clafin*,<sup>66</sup> is everywhere accepted as the law,<sup>67</sup> yet the courts are numerous in their misapplication and strike down many cases of such postponement of the vested interest because for the want of some better reason they say it is in violation of the Rule Against Remoteness. If the courts, in their desire to hold such gifts bad on the theory that the testator contemplated an attempt to make beneficial interests in the property forever inalienable, effect the result by holding such a disposition of the beneficial interests itself to be void, then it is suggested that a more realistic and positive approach may be adopted. Many courts have done so without adding confusion to this fertile source of error. Many courts have been forthright and honest when they have been confronted with the problem and recognize the fact that the Rule Against Perpetuities does not apply to the duration of a private trust when all the interests are vested.<sup>68</sup> Some have

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rule regarding the duration of trusts or under the rule against perpetuities. *Meyers v. Hardin*, 203 Ark. 505, 186 S. W. 2d 925 (1945). Trust to pay income to grandchildren for fifteen years valid, the gross period being treated as part of their lives. *Frederick v. Alling*, 118 Conn. 602, 174 Atl. 85 (1934). Trust for life in being or twenty years valid. *First Nat. Bank of Chicago v. McIntosh*, 366 Ill. 436, 9 N. E. 2d 248 (1937). Trust to last for twenty five years or until named person dies is not void for too long a duration. *Leonard v. Chicago Title and Trust Co.*, 298 Ill. App. 187, 18 N. E. 2d 706 (1939). Trust to last for lives in being valid, although one to last for lives possibly not in being would have violated Sec. 2360 of Kentucky Statutes. *Emler v. Emler's Trustee*, 269 Ky. 27, 106 S. W. 2d 79 (1937). A trust to last for three lives in being and the remainder to vest at the end of the trust, are valid within the common law rules. *Stein v. United States National Bank of Portland*, 165 Or. 518, 108 P. 2d 1016 (1941). A trust which is to last for lives which were all in being when the trust was created, with remainders sure to vest at the end of the trust, is valid under the Washington rules regarding perpetuities. *Bank of California v. Ager*, 109 P. 2d (Wash.) 548 (1941).

<sup>65</sup> 230 N. C. 101, 52 S. E. 2d 229 (1949).

<sup>66</sup> 149 Mass. 19, 20 N. E. 454 (1889).

<sup>67</sup> GRAY, THE RULE AGAINST PERPETUITIES, Sec. 121, 5 P. 120 4th Ed. (1942).

<sup>68</sup> *Colonial Trust Company v. Brown*, 105 Conn. 216, 135 Atl. 555 (1926). In this case a trust was created to pay annuities to living persons and their children for their lives, with a vested remainder. The trustee was given power to sell real estate within five years, except two properties which he was expressly forbidden to sell. The five years had expired. The court held the trust valid, because all interests vested within lives in being although the trust might not terminate until the death of persons not in being. It further held that the prohibition against selling was invalid as a restraint on alienation lasting for a longer period than lives in being and twenty-one years and that the trustee could sell under an order of court.

(Continued on following page)

taken the period of the Rule Against Remoteness of vesting and applied it to a judge-made rule against postponement of enjoyment of vested interests. They have created a rule analogous to the Rule Against Remoteness of vesting. They have said that not only must the interest vest within lives in being and twenty-one years, but that the settlor must allow the direct enjoyment of such interests, even though vested within a similar period.<sup>69</sup> Bogert states<sup>70</sup> that, "If there is such a rule it is a rule that a grantor may not postpone direct enjoyment for too long a period of time. It is not the common law Rule Against Remoteness. It is not concerned with vesting or with alienation, but with enjoyment by means of possession and the legal estate." It is not a rule which could have come to America from England as a part of the common law, because England had no such rule. If it exists, it is a rule created by misinterpretation and is threatening to become a part of our common law on a basis of public policy. It has no connection with the Rule Against Remoteness except that its period is the same.

### Summary.

The Rule Against Remoteness is in force in a majority of the American States,<sup>71</sup> and its application to the creation of trusts by deed or will is apparent. The settlor may, of course, create a trust of realty or personalty in which there are none but present interests in the trustee and cestuis. If so, he does not consider the Rule Against Remoteness, because it applies only to future interests. Thus if S conveys to T (a living person), in trust to pay the income of the realty to C (a living person), for the life of C,

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#### Footnote 68 (continued):

But on this point the court said "There are undoubtedly principles of public policy which cause courts to scrutinize with care efforts to impose restraints upon the alienation of property. The refusal to sanction such restraints has often been attributed to the Rule Against Perpetuities, and, in fact, legislation in many of the states, adopted in supposed modification of that rule, in terms forbids restraints upon alienation. The Rule Against Perpetuities and that against restraints upon alienation are in reality entirely distinct, the former being concerned only with the vesting of estates in right, and the latter with the limitation which may be imposed upon the enjoyment of property. But by an analogy, the same rule has been adopted for determining the period within which an estate must vest in order to be valid."

<sup>69</sup> *Estate of Yates*, 170 Cal. 254, 149 Pac. 555 (1915); *De Lodson v. Crawford*, 93 Conn. 402, 106 Atl. 326 (1919); *Howe v. Howe*, 108 Ill. 307, 38 N. E. 1083 (1894).

<sup>70</sup> BOGERT, *TRUST AND TRUSTEES*, Sec. 218, p. 408 (1951).

<sup>71</sup> *Id.*, note 78 to Sec. 214, p. 346.

T will take a present legal estate for the life of C vested in interests and possession, and C will take a present equitable estate for his own life, which is likewise vested. The rule under discussion will not in any way affect this trust, because the rule has no application to present, vested interests.<sup>72</sup>

Likewise if the settlor created a trust with future interests involved but these future interests were all vested in interest, the rule will not trouble the settlor. Thus if S devises to T (a person living at S's death) as trustee the estate in Blackacre to commence on the death of W (who was living at S's death), and to last for the life of C (who was living at S's death), to hold the realty in trust for C for his life, T will take a vested future legal estate to last for the life of C which will come into possession on the death of W, and C will take a vested equitable interest of like duration. Although these interests of T and C are both future, in that they do not entitle their owners to possession from the date of S's death, they are vested since their owners are known living persons, there is no condition precedent attached to their vesting, and they are ready to take effect in possession whenever their preceding estates terminate. Hence, the settlor of this trust will not be disturbed by any provisions of the Rule Against Remote-

<sup>72</sup> *McAllister v. Elliott*, 83 N. H. 255, 140 Atl. 708 (1928); *Easton v. Hall*, 323 Ill. 397, 154 N. E. 216 (1927); *Singhi v. Dean*, 119 Me. 287, 110 Atl. 865 (1920); *Minot v. Paine*, 230 Mass. 514, 120 N. E. 167 (1920); *Nichols v. Day*, 128 Miss. 756, 91 So. 451 (1907); *Schee v. Boone*, 295 Mo. 212, 243 S. W. 882 (1922); *Green v. Green*, 255 Pa. 224, 99 Atl. 801 (1917).

A trust for persons who will be identified at the death of the testator-settlor does not violate the rule against perpetuities, since all interests are vested in interest, if not in possession. *McClary v. McClary*, 134 F. 2d 455 (10th Cir. 1943). And see *McKibben v. Pioneer Trust and Savings Bank*, 365 Ill. 369, 6 N. E. 2d 619 (1937) (trust to last for part of life of a living person, where all equitable interests of beneficiaries are vested, not subject to the rule). Where interests of cestuis under trust are all sure to vest within lives in being at the creation of the trust, there is no objection on the ground of the rule against remoteness of vesting; *First Nat'l. Bank v. De-Wolfe*, 134 Me. 487, 188 Atl. 283 (1936). Where a gift to a trustee vests immediately on the death of the testator, the fact that the residue under the trust is not disposed of does not create any remoteness of vesting, since the residue is intestate property; *Sarrazin v. First Nat'l. Bank of Nevada*, 60 Nev. 414, 111 P. 2d 49 (1941). Interest of cestuis under trust, which are sure to vest at the end of life in being, even though donees may be persons born after the testator, are not too remote; *Camden Safe Deposit and Trust Co. v. Scott*, 121 N. J. Eq. 366, 189 Atl. 653, 110 A. L. R. 1442 (1937). If interests under trust are vested in ownership within proper time limits, it is immaterial for the purpose of the rule against perpetuities that they may not be vested in possession; *In re Bilyeu's Estate*, 346 Pa. 134, 29 A. 2d 516 (1943). Trust to last for lives in being, with remainder taking effect at the end of trust, does not violate rule against perpetuities; *Pippins v. Sams*, 174 S. C. 444, 177 S. E. 659 (1934).



ness, which has only to do with non-vested,<sup>73</sup> that is contingent, interests.

The creator of a trust of any complexity or length of duration usually attempts to create future contingent interests under the trust, or interests to take effect after the termination of the trust. In making provisions for such contingent future interests, the settlor must be careful to respect the Rule Against Remote-ness of vesting, if he would have his trust secure against attack. Thus, if S wishes to create a trust by his will in favor of his children and grandchildren, providing for grandchildren who may be born after S's death, it is obvious that he desires to provide for future contingent interests for such possible after-born grandchildren. Their interests cannot be vested until they are born. This settlor must therefore be careful to provide for the vesting of such future contingent interests at a date not more remote than the end of a life or lives in being at the time of S's death, plus twenty-one years thereafter. This is exactly what took place in *Mercer v. Mercer*,<sup>74</sup> but the court saw fit by some strange reasoning to declare it void because it was in violation of the Rule Against Perpetuities.

As we have seen, although the secondary or ultimate interest is in violation of the rule, the preceding interests may take effect just as if subsequents clause creating the remote secondary or ultimate interests had never been in the instrument.<sup>75</sup> The valid preceding interests are not affected by the void succeeding interest or lack of any interest.<sup>76</sup> If the valid preceding interests were to be cut off, in a remote contingency, by the secondary or ultimate interests, the valid primary interests will continue on to their natural termination, without danger of being cut off by the void later interests.<sup>77</sup> The American courts have held in numerous cases that separability is possible. Both with regard to dispositions involving trusts and with regard to instruments containing merely gifts of legal interests, they have held that the whole deed or will must be examined to ascertain whether the valid parts of the instrument can stand after the invalid has been stricken out. If the court believes that the settlor would have desired the valid

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<sup>73</sup> Cases cited note 3, *supra*.

<sup>74</sup> Note 1, *supra*.

<sup>75</sup> Cases cited note 35, *supra*.

<sup>76</sup> *Ibid*.

<sup>77</sup> Cases cited note 37, *supra*.

primary provision to stand alone, they will allow separation. But if the court finds either that the whole scheme or gift was a unit or entirety, or that supporting one gift was a unit or entirety, or that supporting one gift without another would mar the settlor's plan and create a disposition he would not have desired, or that it takes the property out of commerce, they will declare the instrument invalid.<sup>78</sup>

<sup>78</sup> For instances of such a degree of connection as caused the void gift to drag down a prior valid gift with it, see *Carnahan v. Peabody*, 29 F. 2d 412 (1928); *Eldred v. Meek*, 183 Ill. 26, 55 N. E. 536 (1899); *Pitzel v. Schneider*, 216 Ill. 87, 74 N. E. 779 (1905); *Lawrence v. Smith*, 163 Ill. 149, 74 N. E. 799 (1896); *Barrett v. Barrett*, 255 Ill. 332, 99 N. E. 625 (1912); *City National Bank and Trust Co. of Evanston v. White*, 337 Ill. 442, 169 N. E. 197 (1930); *Sandford's Adm'r. v. Sandford*, 230 Ky. 429, 20 S. W. 2d 83 (1929); *Lockridge v. Mace*, 109 Mo. 162, 18 S. W. 1145 (1892); *Closset v. Burtchall*, 112 Or. 585, 230 P. 544 (1924); *In re Johnston's Estate*, 185 Pa. 179, 39 Atl. 879 (1898).

The void interests may carry down with it one or more, although not all of the prior interests if the court believes such a result will be most desirable; *Hewitt v. Green*, 77 N. J. Eq. 345, 77 Atl. 25 (1910).

For instances where the prior valid interests were allowed to stand, see *Taylor v. Crosson*, 11 Del. Ch. 145, 98 Atl. 375 (1916); *Overly v. Scarborough*, 145 Ga. 875, 90 S. E. 67 (1916); *Turner v. Safe Deposit and Trust Co.*, 148 Md. 371, 129 Atl. 294 (1925); *Hawkins v. Ghent*, 154 Md. 261, 140 Atl. 212 (1928); *Lavering v. Worthington*, 106 Mass. 86 (1870); *Ewalt v. Davenkill*, 257 Pa. 385, 101 Atl. 756 (1917); *Rhode Island Hospital Trust Co. v. Peck*, 40 R. I. 519, 101 Atl. 430 (1917); *Woodruff Oil and Fertilizer Co. v. Yarborough's Estate*, 144 S. C. 18, 142 S. E. 50 (1928). And see *Keys v. Northern Trust Co.*, 227 Ill. 354, 81 N. E. 384 (1907), indicating that a void power at the end of a trust would not carry the trust down with it. Again, the New Jersey courts are not inclined to carry the good down with the bad unless it is impossible to let the good stand alone; *First National Bank of Ocean City v. Rice*, 101 N. J. Eq. 520, 139 Atl. 396 (1927).

For other cases of separability, see *Union Trust Co. of Springfield v. Nelen*, 283 Mass. 144, 186 N. E. 66 (1933); *In re Fuerth's Estate*, 149 Misc. 422, 267 N. Y. S. 498 (1933); *Second National Bank v. Curie*, 116 N. J. Eq. 101, 172 Atl. 560 (1934).

Where a gift to a class is valid under the rule against perpetuities such gift is not invalidated by a remote gift to a subclass; *Smith's Estate v. Commissioner of Internal Revenue*, 140 F. 2d 759 (3rd Cir. 1944); *Wilmington Trust Co. v. Wilmington Trust Co.*, 21 Del. Ch. 102, 180 Atl. 597 (1935) *modified*, 21 Del. Ch. 188, 186 Atl. 903 (1935) (Interests under or after a trust which may vest more remotely than after lives in being and twenty-one years are void, but the precedent trusts are separable and good).

Where testamentary trust provide for interests in living children and grandchildren and for contingent interests under the trust for possible future born grandchildren, the trust is valid as to those born at the death of the testator, and the question as to the validity of the gift as to possible later born grandchildren is not decided; this amounts to separation of the gifts and giving effect to the trust in part; *Story v. First National Bank and Trust Co.*, 115 Fla. 436, 156 So. 101 (1934).

Where a settlor provides a trust to pay the income to her descendants, with remainder to the heirs of the body of collateral relatives and the remainder is void for remoteness, the trust will be declared void also, since the settlor would not have wanted to limit her descendants to life interests

only if she had known that the remainders were void; *Johnston v. Crosby*, 374 Ill. 407, 29 N. E. 2d 608 (1940).

In another case, there was a remote gift of a remainder interest under a trust, following an income trust for the remaindermen. After declaring the remainder gift void for remoteness, the court decreed that the trustee held for the two grandchildren who were the objects of the settlor's bounty, subject to a duty to convey to them immediately. The court said the income and remainder gifts were void, and carried into effect the "broad, general intent of settlor"; *McErven v. Enoch*, 167 Kan. 119, 204 P. 2d 736 (1949).

The invalidity of a trust for thirty years from the probate of the will of the testator does not affect a gift of the remainder which was to take effect after the trust; *Ford v. Yost*, 300 Ky. 764, 190 S. W. 2d 21 (1945).

Trust for children and grandchildren until death of last survivor and then to great grandchildren, void as to gift of corpus to great-grandchildren since it would not vest until after lives not yet in being; but trust for lives of children and grandchildren is good and separable since all interests under it would vest during lives of the children of settlor who were all necessarily in being at his death; *Pennsylvania Co. Ins. on Lives and Granting Annuities v. Robb*, 118 N. J. Eq. 529, 180 Atl. 410; *affirmed* 123 N. J. Eq. 232, 196 Atl. 741 (1935).

Where remainders following a trust are void for remoteness and the trust is inseparably connected with the remainders, so that the settlor would not have wanted one without the other, the trust is also void; *In re Morrison's Estate*, 173 Misc. 503, 18 N. Y. S. 2d 235 (1939).

Where a remainder following a trust might vest at a remote date and so will violate the rule against perpetuities, the preceding trust for the immediate family will be supported if it does not involve any violations of the rule, and it can be separated from the remainder without frustrating testator's probable intent; *In re Wanamakers' Estate*, 335 Pa. 369, 57 A. 2d 855 (1948).

Where a trust is set up for a son of the testator for his life, and then for the son's children for their respective lives with remainder as to each such child's share to the heirs of such child, the limitations to the grandchildren of the testator are separable and those to grandchildren of the testator are separable, and those to grandchildren who are children of children of the son who were in being when the testator died are valid, even if in the case of a child of the son born after the death of the testator there might be an invalid remote gift; *In re Harrah's Estate*, 364 Pa. 451, 72 A. 2d 587 (1950) *following* Sec. 389, *RESTATEMENT, PROPERTY*.

Gifts of successive life interests are separable from void remainder which might take effect at the end of lives not in being; *Love v. Love*; 208 S. C. 363, 38 S. E. 2d 231, 168 A. L. R. 311 (1946).